was basing his verdict on guesswork instead of on particulars which had been proved in evidence. The conclusions stated in those passages are nothing more than the expression of a theory which is attractive in its probability. It is not probability, however, which determines verdicts, but proved facts, and, if facts which justify a specific verdict are not proved at an inquest, there is no alternative but to return an open verdict.

We have been referred to *Southall* v. *Cheshire Country News Co. Ltd.* 5 B.W.C.C. 251, a workmen's compensation case. An arbitration had been held by the county court judge as the result of the death of a workman who was said to have committed suicide after an injury which it was admitted that he had received. The county court judge found that the death resulted from the accident which caused the suicidal tendency and awarded the dependents a sum of money. The Court of Appeal held that there was no evidence to justify the finding of the judge. Cozens-Hardy M.R. said: 'Suicide is never to be presumed. In the next place there is no evidence of suicidal tendency. The man's son says he never threatened suicide. There is no one who says he anticipated suicide. Strange to say there is the report of the doctor made on the very day before the accident. He did not think there was any suicidal tendency. The judge seems to have thought it was more likely that the man committed suicide than anything else. The judge is not entitled to act upon a surmise of that nature.' Then the Master of the Rolls cites *Richard Evans & Co. Ltd.* v. *Astley* [1911] A.C. 674 at 679. where Lord Atkinson said: 'One not infrequently finds, in cases under this Act, surmises more or less shrewd of this arbitrator or judge, or conjectures more or less plausible, described as inferences of fact, although there are no data whatever from which the so-called inferences can reasonably be drawn.' The Master of the Rolls goes on to say: 'In the present case there is no evidence to support the finding of suicide.' That was not a case of an inquest by a coroner, but the law as stated by the Master of the Rolls and the other members of the Court of Appeal would seem to apply to the circumstances of the present case. As a coroner is bound by evidence and can find only facts which are proved in evidence and are not the result of mere guesswork, I think that here the coroner was betrayed into a mistake in the verdict at which he arrived.

The question then arises what ought to be the result. That is to be determined in the light of s. 6, sub-s. 1, of the Coroners Act, 1887, and if we find that, by reason of insufficiency of inquiry or otherwise, it is necessary or desirable, in the interests of justice, that another inquest should be held we may make an order to that effect. In the exercise of our powers under s. 6, sub-s. 1, I think the inquisition on the inquest which has been held should be quashed, and, inasmuch as it is desirable, in the interests of justice, that there should be a proper inquisition, that another inquest should take place. The coroner will confine himself to establishing facts so far as he can by evidence and then give a verdict which is supported by the facts which have been proved."

The law is that suicide is not to be presumed.

It was for the above reasons that the finding of the learned magistrate was set aside and his verdict of suicide quashed by me and I substituted an open verdict instead.

Verdict of suicide quashed.

Open verdict substituted.

Solicitors: *Shearn, Delamore & Co.*

MELAN BIN ABDULLAH & ANOR. v. PUBLIC PROSECUTOR

[A. Cr.J. (Ong C.J. (Malaya)) November 2, 1971]

[Kuala Lumpur — Criminal Appeal No. 103 of 1971]

Criminal Law — Sedition — Publication in newspaper — Liability of editor — Responsibility for negligence — Editor not failing in higher standard of care and caution required of him — Seditious tendency — Presumption of law raised by amendment to Sedition Act — Sedition Act, 1948 (Act 15 as amended), ss. 3(1)(f), (3), 4(1) (c), 5(1) & 6(2).

On April 6, 1971, the *Utusan Melayu* newspaper published a report of a talk given by a prominent Malay leader and member of Parliament. In the report was an editorial sub-heading, which, in the English translation reads: "Abolish Tamil or Chinese medium schools in this country."

The first appellant was the editor-in-chief of the *Utusan Melayu,* and the second appellant the author of the sub-heading inserted in the report. Sanction for their prosecution was given under section 5(1) of the Sedition Act 1948, and they were tried in due course in the special sessions court on a charge of publishing a seditious publication in contravention of section 4(1)(c) of the Sedition Act, punishable under the same section. The learned special president held the publication to be seditious, that the first appellant "was responsible for all publications in the *Utusan Melayu*", that the second appellant was the author of the impugned sub-heading, and that consequently they were both guilty. They were convicted and fined the sum of $500 and $1,000 respectively, in default one month and two months' imprisonment.

The first appellant had given evidence of the responsibilities of his office, as editor-in-chief, over as many as ten publications of the *Utusan Melayu* group. He had perforce to delegate authority to trusted subordinates. On the Sedition Act, he had organised seminars and discussions, relating in particular to the "sensitive issues" and had instructed his staff on the relevant law as he understood it.

Held: (1) the first appellant had taken all precautionary measures necessary and he had not failed in the high standard of care and caution required of him, and accordingly his conviction must be set aside;

(2) the second appellant was responsible for the sub-heading which clearly violated what was laid down in proviso (a) to article 152 of the Federal Constitution and therefore came within the definition of "seditious tendency" as extended by the new section 3(1)(f) which was added to the Sedition Act, 1948; he was therefore rightly convicted of sedition.

Per Ong C.J.: "...By virtue of the 1970 amendment to the Sedition Act, 'sedition' no longer requires the same judicial approach as the misdemeanour at common law. The amendment was *ad hoc* legislation, passed to meet the special needs and circumstances of the time. The duty of the court is to interpret and uphold the law as passed by Parliament. Whether or not paragraph (f) fits into the common law concept of sedition is wholly beside the point. It does give, however, a new and, perhaps, highly artificial meaning to what used to be considered 'seditious tendencies'. English and Indian authorities are, therefore, of little relevance and are not referred to herein. In my view paragraph (f) is unique in that it raises a presumption of law that anything falling squarely within the terms thereof has a seditious tendency, irrespective of whether or not such thing sows any seeds of disaffection..."

Cases referred to:-

(1) *Sweet* v. *Parsley* [1970] A.C. 132, 157.

(2). *Lim Chin Aik* v. *R.* [1963] M.L.J. 50, 53, P.C., [1963] A.C. 160, 174.

MAGISTRATES CRIMINAL APPEAL.

Kamarul Ariffin bin Mohamed Yassin (*Raja Abdul Aziz* and *Yaacob* with him) for the appellants.

Hashim bin Y.A. Sani (*Gunn Chit Tuan* with him) (Deputy Public Prosecutors) for the respondent.

Cur. Adv Vult.

Ong C.J. (Malaya): On April 6, 1971 the *Utusan Melayu* newspaper published a report of a talk given by Inche Musa Hitam, a prominent Malay leader and member of Parliament, at the National Education Congress held in the Dewan Bahasa dan Pustaka, Kuala Lumpur. In the report was an editorial sub-heading: "Hapuskan Sekolah2 Beraliran Tamil atau China di-Negeri ini", which, in the English translation reads: "Abolish Tamil or Chinese medium schools in this country."

The first appellant was the editor-in-chief of the *Utusan Melayu* and the second appellant the author of the sub-heading inserted in the report. Sanction for their prosecution was given under section 5(1) of the Sedition Act 1948 (Revised — 1969) and they were tried in due course in the special sessions court at Kuala Lumpur on a charge of publishing a seditious publication, namely, the sub-heading quoted, in contravention of section 4(1)(c) of the Sedition Act, punishable under the same section. In the result they were convicted and fined the sum of $500 and $1,000 respectively, in default one month and two months' imprisonment. They both have appealed against their conviction and sentence.

Section 4(1)(c) provides that "any person who prints, publishes ... any seditious publication shall be guilty of an offence". The learned special president held the publication to be seditous, that the first appellant "was responsible for all publications in the *Utusan Melayu*", that the second appellant was the author of the impugned sub-heading and that consequently they were both guilty.

I shall deal first with the case against the first appellant. Section 4(1)(c) read by itself, would appear to create an offence of absolute liability. This was the submission made by the prosecution. The first appellant, in answer thereto, relied on the provisions of section 6(2) which reads: —

"No person shall be convicted of any offence referred to in section 4(1)(c) or (d) if the person proves that the publication in respect of which he is charged was printed., published, sold, offered for sale, distributed, reproduced or imported (as the case may be) without his authority, consent and knowledge and without any want of due care or caution on his part, or that he did not know and had no reason to believe that the publication had a seditious tendency."

The prosecution conceded that this appellant had no prior knowledge of the publication of the offending sub-heading, but submitted that, although he had delegated his authority to the sub-editors under him, he was still responsible as he had the power of veto and in the circumstances he had failed to exercise due care and caution: he could not therefore be held exonerated by the provisions of section 6(2).

The first appellant gave evidence of the responsibilities of his office, as editor-in-chief, over as many as ten publications of the *Utusan Melayu* Group, employing a staff of over 140 persons. He had perforce to delegate authority to trusted subordinates. On the Sedition Act he had organised seminars and discussions, relating in particular to the "sensitive issues" and had instructed his staff on the relevant law as he understood it. He had sponsored a talk to journalists given on this subject in February 1971 by the Attorney-General as well as the Solicitor-General — although he was himself unable to attend by reason of illness. Although responsible for all *Utusan* publications it was impossible for him to read all of them every day.

The learned special president agreed "there may be some justification for saying that it would be impossible for him to go through each and every article in the 10 publications", but he had given a blanket authorisation to his sub-editors and thereby his authority and consent for the publication of the impugned sub-heading. As to the exercise of "due care and caution" on his part the special president considered that, in the circumstances, he had failed.

With all due respect, I have no hesitation in holding that the first appellant ought not to have been convicted. The submission unfortunately made by the prosecution, that section 4(1)(c) creates an offence of absolute liability, might have caused some obfuscation of the real issue at the trial. An offence of strict or absolute liability is one where proof of the *actus reus* alone suffices for a conviction, however morally free from blame the defendant may be. Section 6(2), however, refers specifically to section 4(1)(c) and exculpates any person who succeeds in proving that the act constituting the offence was committed, not only without his knowledge, but also without any negligence on his part. This, in my view, is a striking instance of the type of cases where, as Dr. Glanville Williams put it:

"There is a half-way house between *mens rea* and strict responsibility which has not yet been properly utilised, and that is responsibility for negligence."

For this view Lord Pearce gave the stamp of his approval when he said in *Sweet* v. *Parsley*[1]: —

"If it were possible in some so-called absolute offences to take this sensible half-way house, I think that the courts should do so."

That case unfortunately was not brought to the attention of the special president. At page 163, the judgment of Lord Diplock contains a passage which I think is particularly applicable as follows: —

"Where penal provisions are of general application to the conduct of ordinary citizens in the course of their every day life the presumption is that the standard of care required of them in informing themselves of facts which would make their conduct unlawful, is that of the familiar common law duty of care. But where the subject-matter of a statute is the regulation of a particular activity involving potential danger to public health, safety or morals in which citizens have a choice as to whether they participate or not, the court may feel driven to infer an intention of Parliament to impose by penal sanctions *a higher duty of care* on those who choose to participate and to place upon them *an obligation to take whatever measures may be necessary to prevent the prohibited acts*, without regard to those considerations of cost or business practicability which play a part in the determination of what would be required of them in order to fulfil the ordinary common law duty of care. But such an inference is not lightly to be drawn, nor is there any room for it *unless there is something that the person on whom the obligation is imposed can do directly or indirectly, by supervision or inspection, by improvement of his business methods or by exhorting those whom he may be expected to influence or control*, which will promote the observance of the obligation (see *Lim Chin Aik* v. *R.*)".

Carrying on with the quotation from *Lim Chin Aik*,[2] Lord Evershed in that case went on to say: —

"... Unless this is so, there is no reason in penalising him, and it cannot be inferred that the legislature imposed strict liability merely in order to find a luckless victim. This principle has been expressed and applied in *Reynolds* v. *G.H. Austin & Sons Ltd.* ([1951] 1 All E.R. 606) and *James & Son Ltd.* v. *Smee* ([1954] 3 All E.R. 273). Their Lordships prefer it to the alternative view that strict liability follows simply from the nature of the subject-matter and that persons whose conduct is beyond any sort of criticism can be dealt with by the imposition of a nominal penalty."

In the instant case I cannot think of any further precautionary measures, over and above what the first appellant had done, which he ought to have taken to ensure that his publications would not infringe against the Sedition Act. The learned special president, however, appeared to have thought that the principle *respondeat superior* was sufficient. Applying the principles in negligence to this appellant's conduct, I do not think he had failed in the higher standard of care and caution required of him. His conviction and sentence must, therefore, be set aside.

I turn now to the second appellant. In his case there was no defence under section 6(2). The only question to be determined is whether or not the publication was seditious. The word "seditious" is defined in section 2 as having a "seditious tendency" and section 3 goes on to provide that —

"(1) A 'seditious tendency' is a tendency —

(a) to bring into hatred or contempt or to excite disaffection against any Ruler or against any Government;

(b) to excite the subject of any Ruler or the inhabitants of any territory governed by any Government to attempt to procure in the territory of the Ruler or governed by the Government, the alteration, otherwise than by lawful means, of any matter as by law established;

(c) to bring into hatred or contempt or to excite disaffection against the administration of justice in Malaysia or in any State;

(d) to raise discontent or disaffection amongst the subjects of the Yang di-Pertuan Agong or of the Ruler of any State or amongst the inhabitants of Malaysia or of any State; or

(e) to promote feelings of ill-will and hostility between different races or classes of the population of Malaysia."

On May 15, 1969 the Yang di-Pertuan Agong issued a Proclamation of Emergency — see P.U.(A) 145/1969. On August 3, 1970 the Yang di-Pertuan Agong promulgated the Emergency (Essential Powers) Ordinance No. 45/1970, which came into force on August 10, 1970. Pursuant thereto the Sedition Act was amended *by adding* paragraph (f) to sub-section (1) of section 3 as follows: —

"(f) to question any matter, right, status, position, privilege, sovereignty or prerogative established or protected by the provisions of Part III of the Federal Constitution or Article 152, 153 or 181 of the Federal Constitution."

Sub-section (2) of section 3 was amended at the same time, consequential on the introduction of paragraph (f) into sub-section (1), and reads as follows: —

"(2) Notwithstanding anything in subsection (1) an act, speech, words, publication or other thing shall not be deemed to be seditious by reason only that it has a tendency —

(a) to show that any Ruler has been misled or mistaken in any of his measures;

(b) to point out errors or defects in any Government or constitution as by law established (*except* in respect of any matter, right, status, position, privilege, sovereignty or prerogative referred to in paragraph (f) of subsection (1) *otherwise than* in relation to the implementation of any provision relating thereto) or in legislation or in the administration of justice with a view to the remedying of the errors or defects;

(c) *except* in respect of any matter, right, status, position, privilege, sovereignty or prerogative referred to in paragraph (f) of sub-section (1) —

(i) to persuade the subjects of any Rulers of the inhabitants of any territory governed by any Government to attempt to procure by lawful means the alteration of any matter in the territory of such Government as by law established; or

(ii) to point out, with a view to their removal, any matters producing or having a tendency to produce feelings of ill-will and enmity between different races or classes of the population of the Federation,

if the act, speech, words, publication or other thing has not otherwise in fact a seditious tendency."

Sub-section (3) of the section retains its original form, that is to say, "For the purpose of proving the commission of any offence against this Act the intention of the person charged at the time he ... uttered any seditious words or printed, published ... any publication ... shall be deemed to be irrelevant if in fact the ... words, publication ... had a seditious tendency".

The result or effect of the 1970 amendments made in the Act of 1948 may be said to widen the definition of "seditious tendency" by making virtually taboo any topic of public discussion calling in question the provisions of Part III or Articles 152, 153 and 181 of the Federal Constitution.

Sub-section (2) of section 3, in my view, is now nugatory to all intents and purposes. It starts to qualify or limit the broad application of sub-section (1) by saying that an act or publication "shall not be deemed to be seditious by reason only that it has a tendency" to be critical of authority, but ends contrariwise with the qualification: "if the act, speech, words, publication or other thing has not *otherwise in fact a seditious tendency*. In short, it simply lays down that the test to be applied is whether or not the act impugned has *in fact a seditious tendency*. Sub-section (3) of section 3 in the same strain goes on to emphasise that intention is irrelevant if in fact the act had a seditious tendency.

The 1970 amendment to sub-section (2) piled exception upon exception, while expressly saving from condemnation such criticisms as may be made "in relation to implementation" of the relevant articles in the Constitution. But any effect it may be intended to have on sub-section (1) is rendered wholly nugatory by paragraph (c) of sub-section (2), since the new paragraph (f) is all-powerful. How the provisions of sub-section (2) can possibly affect the simple test laid down is beyond my comprehension. The law, therefore, as I construe it, is that the doing or making of any act or publication having in fact a seditious tendency renders the person responsible liable to prosecution under section 4(1)(c) of the Sedition Act. The most significant effect of the 1970 amendment lies in paragraph (f) of sub-section (1), whereby the definition of a "seditious tendency" includes questioning any of the provisions and articles in the Federal Constitution

therein specified. The ban on such questions is made absolute by paragraph (c) of sub-section (2).

In this light, accordingly, I have to deal with the question whether the sub-heading was a seditious publication. It was "seditious" if it had a "seditious tendency" and for the prosecution to establish such tendency all they had to show to the satisfaction of the court was that the publication questioned one of the matters specified in paragraph (f).

For present purposes it is relevant to quote only article 152(1) of the Federal Constitution, which reads: —

"(1) The national language shall be the Malay language and shall be in such script as Parliament may by law provide: Provided that —

(a) no person shall be prohibited or prevented from using (otherwise than for official purposes), or from teaching or learning, any other language; and

(b) nothing in this clause shall prejudice the right of the Federal Government or of any State Government to preserve and sustain the use and study of the language of any other community in the Federation."

This appellant's petition of appeal sets out various grounds. At the outset there are grounds raising the question of the trial court's jurisdiction. It is contended on this point —

(a) that the learned special president erred in law in not construing the relevant provisions of the Sedition Act, 1948, as revised, so as to bring them into accord with the provisions of article 10 of the Federal Constitution;

(b) that the judgment of the learned special president, in so far as it held that the impugned sub-heading had the tendency specified in section 3(1)(f) of the Sedition Act, 1948, as revised, is bad in law in that the provisions of the said section 3(1)(f) are not valid by reason of the same having been promulgated in contravention of the provisions of article 150 of the Federal Constitution.

The short answer to these objections is that it does not fall within the jurisdiction of any court other than the Federal Court to decide on the validity of any law, or any provision in any statute, passed by Parliament as contrary to the Constitution: see article 128. It was submitted that the amendment to the Sedition Act was invalid in that clause (2) of article 150 provided for the Yang di-Pertuan Agong to "summon Parliament as soon as may be practicable, and may until both Houses of Parliament are sitting, promulgate ordinances having the force of law..." It was stressed that Parliament was not convened for 22 months, and accordingly had not been summoned as soon as may be practicable. I do not think this or any court is competent to decide when it was practicable for Parliament to be convened during an Emergency. The special president in the instant case had only to look to the Sedition Act 1948 — as amended *after* Merdeka Day — and apply the test I have stated, in order to determine whether or not the charge was proved. He could do no more and he did nothing less, since article 162(6) has no application except to existing law "which has not been modified on or after Merdeka Day," certainly not to paragraph (f).

I turn now to the principal ground of appeal, namely, was the sub-heading seditious for contravening paragraph (f) of sub-section (1) of section 3? The charge, let it be emphasised, was in respect of the words used in the sub-heading — not in respect of anything reportedly uttered by Inche Musa Hitam at the National Education Congress. The learned president held that it fell foul of article 152. Proviso (a) to article 152(1) lays down that "no person shall be prohibited or prevented from using (otherwise than for official purposes), or from teaching or learning, any other language." It has been contended that abolition of schools is not quite the same thing as preventing the "teaching or learning" of any language taught in those schools. This argument, in my opinion, is pure sophistry for it cannot be said that the abolition of Tamil or Chinese medium schools does not do away with the very source in which knowledge of those languages is imbibed. The meaning ordinarily conveyed by the words "Abolish Tamil or Chinese medium schools in this country" is clear and unambiguous. They call in question the teaching of Tamil or Chinese. The sub-heading may not unfairly be described as a clarion call for the abolition of Tamil and Chinese Schools; at least, it posed a challenge to the continued application of article 152 of the Constitution. It is to be observed that Inche Musa Hitam denied uttering those words ascribed to him. "Neither", said he "was it an aspect of my talk". Even were he alleged to have uttered those words used in the sub-heading it was still no defence for the second appellant to publish them. In that event, separate and distinct offences would have been committed by different individuals in contravention of paragraphs (b) and (c) of section 4(1). A reportorial error is no excuse. Correct *verbatim* reporting, even, of a seditious utterance is no excuse for publishing the same.

Nor could this appellant have pleaded, by virtue of section 6(2), "that he did not know and had no reason to believe that the publication had a seditious tendency". In the first place, it was enough that the sub-heading offended against paragraph (f) of section 3(1). In the second place, section 3(3) declares that intention (including, of course, good faith) shall be deemed to be irrelevant if, in fact, the publication had a seditious tendency. In the third place, but by no means the least important, the reported view of Inche Musa Hitam on this point was expressed by him in the subjunctive mood, but was transmuted into the indicative mood in the sub-heading, for which the second appellant must bear full responsibility. There is a world of difference between a hypothesis and a statement of fact. The sub-heading was in fact a tendentious misinterpretation of the point made by the speaker. Hence it was not justifiable, whether or not it was read in the context in which it appeared.

To sum up on the law, once the conclusion is reached that the sub-heading offends against the absolute prohibition imposed by paragraph (c) of sub-section (2) on any matter specified in paragraph (f) of sub-section (1) the prosecution would have proved their case to the hilt. The sub-heading clearly violated what is laid down in proviso (a) to article 152(1) of the Federal Constitution. It therefore comes squarely within the definition of "seditious tendency" as extended by paragraph (f). On this point I think a few words may usefully be added by way of explanation. By virtue of the 1970 amendment of the Sedition Act,

"sedition" no longer requires the same judicial approach as the misdemeanour at common law. The amendment was *ad hoc* legislation, passed to meet the special needs and circumstances of the times. The duty of the court is to interpret and uphold the law as passed by Parliament. Whether or not paragraph (f) fits into the common law concept of sedition is wholly beside the point. It does give, however, a new and, perhaps, highly artificial meaning to what used to be considered "seditious tendencies". English and Indian authorities are, therefore, of little relevance and are not referred to herein. In my view paragraph (f) is unique in that it raises a presumption of law that anything falling squarely within the terms thereof has a seditious tendency, irrespective of whether or not such thing sows any seeds of disaffection. I would accordingly affirm the conviction and dismiss the appeal. I can only express the hope that, as and when the justification no longer exists for banning fair comment on matters of public interest, the 1970 amendments to the Sedition Act will be removed.

As to sentence, the learned special president has imposed a comparatively light fine, taking into account all relevant circumstances. There have been compelling reasons to make the law what it is. Any dilution of its deterrent effect by the court will not be in the national interest. For this reason I would also affirm the sentence.

Appeal of the first appellant allowed.
Appeal of the second appellant dismissed.